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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF APPELLEE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

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QUESTION PRESENTED

Whether the Cable Act's "must carry" provisions, which apply general prohibitions against the anticompetitive conduct of cable system monopolies in control of essential, bottleneck facilities and thus preserve the system of allocating local television broadcast signals, are consistent with the demands of the First Amendment.

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BRIEF OF APPELLEE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

STATEMENT OF THE CASE

Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, § 2(a)(2) (codified at 47 U.S.C. §§ 534, 535) (the "Cable Act"), in essence require that cable television system operators make available a certain limited percentage of their channels for carriage of competing commercial (Section 4) and noncommercial (Section 5) broadcast stations. These so-called "must carry" provisions are the product of years of congressional deliberations and are supported by extensive findings. The congressional findings, set forth in the Cable Act itself, pertain to: (1) abuses of the bottleneck monopoly that cable operators enjoy over delivery of programming, including broadcast television programming, to more than 60 percent of television households in the

United States; (2) the incentives and ability that cable system operators have to use their monopoly power to injure local broadcast stations that compete with them for advertising revenues; and (3) the importance of preventing anticompetitive conduct that threatens to destroy the current community-based, broadcast allocation scheme that serves viewers—both subscribers to cable television and particularly those who cannot or do not subscribe—throughout the Nation.

The Cable Act's must carry provisions directly and narrowly advance Congress' substantial interest in preventing anticompetitive conduct. The Act expressly declares its procompetitive purpose, and sets forth a clear mandate that responds directly to cable operators' incentive and demonstrated ability to abuse their monopoly power. The Act's protections are addressed to the class of competitors most directly subject to these monopoly abuses. The Act protects competitors by mandating access—the traditional remedy applied to monopolists that use their control of essential facilities to harm their competitors. Such measures, which are designed purely to prevent anticompetitive conduct, are not subject to any heightened First Amendment scrutiny when directed at an information provider using its monopoly information transport facility to stifle competition. Finally, the must carry provisions readily meet any "tailoring" requirement that may be imposed in this case, and thus, the District Court correctly upheld the must carry provisions against First Amendment challenge.

1. Appellants are cable system operators and cable programming providers that seek to have the must carry provisions of the Cable Act enjoined as a violation of their rights protected under the First Amendment. Pursuant to Section 23 of the Cable Act, 47 U.S.C. § 555 (c)(1), this constitutional challenge was heard by a three-judge court in the United States District Court for the District of Columbia. Appellee, the Association of

Independent Television Stations, Inc. ("INTV")—as the representative of the independent commercial television stations that suffer disproportionately from the cable system operators' monopoly abuses—intervened as a defendant in that action to urge the court to sustain the Cable Act. The constitutional challenge to the "must carry" provisions of the Cable Act was rejected by the three-judge district court, with one judge dissenting. See Brief of the United States at 6-9.

2. INTV is a nonprofit, incorporated association of commercial television stations that are not affiliated with the three principal television networks (ABC, NBC, and CBS). INTV's membership does not include any of the existing broadcast network organizations, although a number of stations affiliated with the Fox television network are members. In contrast to established VHF network affiliate stations, INTV member stations tend to be newer, UHF stations. The Cable Act prevents cable systems' anticompetitive actions that are particularly directed at and threaten the viability of smaller local commercial stations, which compete with cable systems for local advertising revenue. See *infra* pp. 15-17. For this reason, INTV was an active participant in the congressional proceedings that led to the enactment of the 1992 Cable Act and represents stations that are principal beneficiaries of the competitive safeguards that Congress implemented through the must carry provisions.

3. The history and nature of the relationship between cable television systems and local broadcast stations demonstrate the necessity of governmental regulation of cable systems generally and, in particular, the validity of the must carry provisions' response to the anticompetitive risks to broadcasters posed by cable systems' local bottleneck monopolies. Although broadcast television and cable television both provide video programming to the public, they are distinct technologies with differing operational characteristics.

Broadcast television stations transmit video signals over-the-air.[1] The Communications Act of 1934, as amended, delegated broad authority to the FCC to regulate broadcasting and specifically empowered the FCC to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of . . . service to each of the same." 47 U.S.C. § 307(a) & (b) (delegating authority to FCC to license stations "if public convenience, interest, or necessity will be served thereby"). The FCC in 1952 apportioned television channels among various communities across the country.[2] Both UHF and VHF channels were allotted.[3]

[1] Television signals are received via antennas that typically range from so-called "rabbit ears" that are placed on top of the television receiver to large outdoor antennas perched on masts 30 feet or more above ground. As a result of the line-of-sight characteristics of television signals, large outdoor antennas are capable of receiving television signals from farther away than indoor antennas. Large, outdoor antennas also are more costly and unsightly. Congress found that cable subscribers do not maintain their outdoor antennas and that the so-called A-B switch, which selects between a cable input and an antenna input was not a feasible means of maintaining subscriber access to local off-air signals. *See infra* p. 18 & note 14.

[2] *Television Assignments*, 41 F.C.C. 148 (1952) (FCC was guided by the goal that "as many communities as possible should have the opportunity of enjoying the advantages that derive from having local outlets that will be responsive to local needs"). The initial Table of Allotments established in 1952 has been amended from time to time. As of December 31, 1992, 1063 individual communities had been allotted television channels. These communities form approximately 225 television markets.

[3] Ten years later, Congress reaffirmed the importance of local, competitive services in enacting the All-channel Receiver Act, 47 U.S.C. § 303(s), which required television receivers to be constructed so that they could receive both UHF and VHF channels. Congress' goal was as follows:

> a television system which will serve all the people, encourage local outlets, foster competition—particularly in large markets—and meet educational needs.

[Continued]

Only a channel allotted to a specific community may be used by a broadcast television station, each of which is licensed to use a single, specific frequency or channel. The result is a ubiquitous, free television service which provides a diverse and competitive array of signals in local communities across the country.

Cable television is a means of distributing television or video program signals via wire or cable, instead of over-the-air.[4] In its infancy, cable television provided only an antenna service[5] and was known as a community antenna television or "CATV." CATV developed in response to demand for access to more broadcast signals than were available locally by antenna or for better reception of broadcast television signals. This demand was greatest in areas where off-air reception of broadcast television station signals was limited by distance, terrain, or urban "ghosting." Consequently, cable television systems developed initially in such diverse areas as the isolated valleys of Pennsylvania and West Virginia and the "canyons" of Manhattan.

H. R. Rep. No. 1559, 87th Cong., 2d Sess. 3, 9 (1962). *See also United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 174-75 (1968).

[4] Cable systems drew the moniker "cable" because cable systems use coaxial cable to distribute signals. Cable systems now are using optical fiber to replace traditional coaxial cable in many portions of their distribution systems. Optical fiber can carry many more signals than coaxial cable and also is immune from electrical interference.

[5] In their so-called "antenna" capacity, cable systems simply receive and retransmit television station signals. Local signals typically are received off-the-air at the cable system's head-end and retransmitted directly to cable subscribers. In some instances, a cable system may receive a local signal from a microwave relay system used by the cable operator to forward signals from a more convenient reception point. Cable systems also "process" all signals received so as to integrate them into their distribution system. Processing usually involves amplification of the signal and election

Cable television systems can and do provide television programming. However, cable distribution of television programming differs significantly from over-the-air transmission. First, cable operators charge viewers directly for service. In contrast, broadcasting is a totally advertising-supported medium which provides its signals to viewers for free. Second, cable is a natural monopoly. The inherent economies of scale in the construction of a cable system, as well as the theoretically unlimited capacity of cable or optical fiber, ensure that a single provider is the most efficient method of distributing signals.[6] Third, when a television set is connected to a cable system, the physical connection to the set as a practical matter supplants the off-the-air antenna connection, which means that cable subscribers can no longer receive broadcast television signals directly off-the-air.[7] Broadcast stations enjoy no comparable ability to foreclose competition from other broadcast stations or other competing media.

Cable systems always have carried broadcast station signals, and they still use broadcast television signals as one of their program offerings. Indeed, use of broadcast television signals was essential to cable's growth because,

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of the channel (frequency) on which it will be transmitted. They typically make no determinations as to whether to include particular programs from the station or to exclude others. Their function is precisely that of a passive antenna.

[6] The Department of Justice has stated its reluctance to challenge mergers between competing cable systems in light of cable's "natural monopoly characteristics." Department of Justice Press Release (Apr. 1, 1985), *cited in*, Glenn B. Manishin, *Antitrust and Regulation in Cable Television: Federal Policy at War with Itself*, 6 Cardozo Arts & Entertainment L.J. 75, 87-88 (1987); The Sloan Commission on Cable Communications, *On the Cable: The Television of Abundance* 147 (1971) ("[t]he arguments in favor of divorcing ownership from transmission derive additional strength from the inherent monopoly of cable system in any locality as opposed to the competition of several over-the-air broadcasters in most places").

[7] *See infra*, at p. 18 & note 14.

apart from cable's transmission capacity, broadcast signals historically were one of cable television's principal products. Without those signals, cable systems would have had nothing to offer except a new set of wires into the home—a conduit with no content. This unique aspect of the competitive relationship between the two industries has been a core consideration in much of the debate over regulation of cable television. The FCC and Congress consistently have embraced regulatory approaches dedicated to maintaining this essentially symbiotic relationship.

Thus, to permit cable systems to prosper, Congress granted those systems extraordinary protection from copyright claims by broadcasters. Copyright Revision Act of 1976, Pub. L. No. 94-553, 90 Stat. 2451 (codified at 17 U.S.C. § 100 *et seq.*) On the other hand, failure to carry local stations was considered anticompetitive even at the outset of cable operations. In 1965, when it originally asserted jurisdiction over microwave-served CATV systems, the FCC stated that "the failure or refusal by a CATV system to carry the signal of a local station" would constitute "an unreasonable restriction upon the local station's ability to compete."[8]

Because failure to carry local signals would be "patently destructive of the goals we seek in allocating television channels to different areas and communities," the FCC adopted local carriage requirements for microwave-served systems in 1965 and applied similar restrictions on all cable systems in 1966. The FCC observed that "failure to carry local stations and duplication of their programs are unfair competitive practices" and that "the CATV system which fails to carry the local station on its system has in practical effect cut off the station from access to CATV subscribers." *In re CATV, Second Report & Order*, 2 F.C.C.2d 725, 736 (1966). In 1972, the FCC again adopted new local carriage requirements or

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[8] *In re CATV, Second Report & Order*, 2 F.C.C.2d 725, 736 (1966) (internal quotation omitted).

"must carry" rules applicable to all cable systems. It reiterated its objective "to assure that 'local' stations are carried on cable television systems and are not denied access to the audience they are licensed to serve." Thus, the must carry requirements have for years been at the core of the interdependent relationship between broadcast and cable television.

4. The district court, in upholding the must carry provisions of the Cable Act against appellants' constitutional challenge, found:

> because the record indicates that Congress' primary purpose in enacting must-carry was to restore competitive balance and assure a functional market in the distribution of video signals, whatever might be said with those signals, the must-carry provisions appear to be unrelated to the content of the expression they will affect.

Jurisdictional Statement App. ("J.S.") 19a. Accordingly, the court determined that it need not decide whether, in general, cable should be treated "like" newspapers or broadcasters for First Amendment purposes; instead, the court concluded that the constitutionality of the must-carry provisions should be tested under the standard for incidental, non-content-based speech restrictions set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968), and *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). J.S. 22a.

Applying that standard, the court concluded that the United States had articulated a significant government interest: "to promote fair competition among video 'speakers' in order to assure the survival of local broadcasting for the benefit of both those who subscribe to a cable service and those who do not." J.S. 23a. The court pointed to the "substantial record assembled by Congress" to support its conclusion that local broadcast television was in "serious jeopardy" as a "result of the cable operators' attempts to obtain a competitive advantage, not [as a result of] consumer demand." J.S. 24a-25a.

Although Judge Williams did not embrace appellants' view that heightened scrutiny is triggered merely by cable operators' status as speakers for purposes of the First Amendment, he nevertheless dissented from the holding of the court. He reasoned that because the must carry provisions benefited a particular "class of speakers," *i.e.*, local broadcast stations, those provisions must be subject to strict scrutiny. The dissent found that "at least at some level of abstraction," Congress' expressed interests, such as preserving free "over-the-air" local broadcasting, were "compelling." J.S. 58a, 61a. Under Judge Williams's view, however, any congressional interest in promoting those ends could be served by the "obviously" less intrusive alternative of "expansion of the [leased] access provisions of 612 of the 1984 Act." J.S. 59a.

SUMMARY OF ARGUMENT

This case can and should be resolved without determining what level of First Amendment protection generally should apply to the "speech" of cable television systems. Instead, the real issue is whether the must carry provisions directly advance the government's interest in preventing anticompetitive conduct. They do. Such procompetitive measures do not trigger strict scrutiny.

1. Congress precisely set forth in the Cable Act itself the basis for the conclusion that the must carry provisions directly serve to prevent anticompetitive practices. Congress specifically identified the cable systems' monopoly control over essential facilities required to distribute video programming, including programming of local broadcast stations. Congress also found that the cable operators have the ability to injure local broadcast stations by refusing to carry their signals and repositioning their signals to disadvantageous channels. In addition, Congress delineated how cable operators have an incentive

to abuse their monopoly power to harm local broadcasters because local broadcasters and cable operators compete directly for advertising revenue.

In addition to Congress' express statements, the procompetitive nature of the must carry provisions is reflected in the fact that Congress' rationale and remedy precisely mirror those established under Section 2 of the Sherman Act. Under traditional antitrust doctrine, a monopolist's ability to employ essential facilities to harm its competitors justifies imposition of an access requirement. That is exactly what Congress did in the must carry provisions. This type of application of general antitrust principles to cable systems, which not only function as information providers but also maintain monopoly control over transport facilities, does not trigger heightened First Amendment scrutiny. Instead, such regulation furthers First Amendment principles because it promotes competition of ideas. This Court has elaborated that conclusion in a range of cases applying antitrust principles to newspapers and other information providers, and indeed has done so in the very cases that set forth the "essential facilities" doctrine that Congress employed. Remedial and prophylactic measures targeting information providers' monopolistic practices necessarily distinguish between anticompetitive "speakers" and those "speakers" who are victims of monopolistic abuse. The First Amendment readily accommodates such distinctions, which is all that this case involves.

II. In many First Amendment contexts, this Court has required a showing that the challenged restriction "fits" or is tailored to the asserted neutral government interest. If the Court imposes such a requirement in this case, the must carry provisions readily meet it. Congress has crafted the must carry provisions to protect precisely those local broadcast stations most subject to monopolisitc abuse; Congress has done so in the manner traditionally employed in antitrust cases, by requiring that the monopolist provide access; and Congress has ensured that cable operators have ample remaining means of disseminating information.

III. The quickly emerging and developing information technologies make it imperative that this Court pursue the traditional First Amendment analysis that allows the government to pursue procompetitive regulation, such as that embodied in the must carry provisions. The information producing and transmitting industries pose an increasing range of traditional anticompetitive risks, which Congress and the FCC must remain free to address. If, conversely, this Court adopts appellants' analysis which depends solely upon the First Amendment "status" of the speaker—without regard to the monopolistic practices the "speaker" has a powerful incentive to pursue—then a range of increasingly important governmental regulation affecting competition in the information industries will be imperiled.

ARGUMENT

THE CABLE ACT'S MUST CARRY PROVISIONS ARE CONSISTENT WITH THE FIRST AMENDMENT BECAUSE THEY REFLECT CONGRESS' DIRECT EFFORT TO HALT AND PREVENT CLASSIC ABUSES OF MONOPOLY POWER BY CABLE OPERATORS.

This case turns upon a fundamental distinction that runs throughout this Court's First Amendment jurisprudence: whether a challenged governmental measure either (1) serves a "governmental interest . . . unrelated to the suppression of free expression," *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968), because it is "justified without reference to the content of the regulated speech," *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal quotation omitted); or (2) implicates strict judicial scrutiny because the measure lacks a neutral purpose, which is established by indications that "the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.*

Appellants' underlying arguments disregard what certain of their *amici* concede, that "the nature of the governmental restriction on speech is the critical factor in determining the appropriate level of scrutiny." Brief of United States Tel. Ass'n at 18. Measures designed to prevent anticompetitive conduct are foremost among the governmental interests that are, by their very nature, unrelated to regulation of expression and not justified in terms of the content of speech. This is so even when such procompetitive measures draw a distinction among classes of speakers and have an incidental effect upon speech, because they are applied to entities that produce information. See, *e.g.*, *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775, 800 n.18 (1978); *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155-56 (1951); *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945); *infra* pp. 28-34.

The Cable Act's must carry provisions in fact directly advance a governmental interest in preventing anticompetitive conduct. Therefore, they trigger no strict scrutiny, and are subject at most to a "tailoring" requirement to ensure that Congress has in fact pursued an interest in protecting competition. See *infra* pp. 28-34. There is no doubt that the must carry provisions are precisely this type of measure. See *infra* pp. 14-28, 34-39.

This case thus can and should be resolved without addressing the principal claim that underlies all of appellants' arguments: that cable television systems are entitled to the greatest degree of First Amendment protection in all situations. Even conceding that to be so in certain circumstances, appellants' arguments beg the essential question whether Congress designed the must carry provisions to redress carefully identified anticompetitive threats or to burden particular messages or speakers. The history of the broadcast and cable industries, as well as the structure and history of the must carry provisions demonstrate that the provisions clearly are a permissible form of procompetitive regulation.

I. IN ENACTING THE MUST CARRY PROVISIONS, CONGRESS PRECISELY AND SPECIFICALLY TARGETED CLASSIC ANTICOMPETITIVE PRACTICES THAT ARE CONTRARY TO GENERAL ANTITRUST PRINCIPLES.

Given the care and detail with which Congress outlined the competitive justifications for the must carry provisions, only the strongest evidence could justify the conclusion that those provisions were not in fact designed to advance competitive purposes. Deference to Congress' determination of the character and suitability of the must carry provisions is particularly appropriate because this case presents review of essentially factual judgments regarding competitive conditions that in turn underlie policy considerations. "When Congress makes findings on essentially factual issues . . . , those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985); see *Rostker* v. *Goldberg*, 453 U.S. 57, 72-73 (1981); *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990).[9]

This Court has indicated that for measures designed to govern complex and highly regulated industries, such as broadcasting and cable television, courts "must afford great weight to the decisions of Congress." *Columbia Broadcasting Sys., Inc.* v. *Democratic Nat'l Comm.*, 412

[9] Deference is particularly warranted in this case because Congress acted on the basis of an exhaustive study of the precise competitive concerns that directly bear upon the legal issues posed by this constitutional challenge. *See infra* pp. 14-21. These circumstances sharply distinguish this case from the bare legal issue addressed in *Sable Communications* v. *FCC*, 492 U.S. 115 (1989), where this Court invalidated an Act of Congress after noting that "the congressional record contains *no* legislative findings" of fact relevant to the legal issue of tailoring. *Id.* at 129 (emphasis added).

U.S. 94, 102 (1973). In such circumstances, this "weight" is reflected by acceptance of Congress' characterization of the competitive problems it identifies and the likely efficacy of its chosen remedies, rather than deference on the ultimate legal issue:

> That is not to say we "defer" to the judgment of the Congress and the Commission on a constitutional question . . . . The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem.

Id. at 103. Finally, appellants bear a particularly heavy burden in this case in which they seek to topple a regulatory scheme constructed by Congress before that scheme actually operates. See *Rust* v. *Sullivan*, 111 S. Ct. 1759, 1767 (1991) ("'A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid'") (citation omitted).

A. Congress Specifically Identified The Cable System Operators' Financial Incentive And Ability To Use Their Bottleneck Monopolies To Injure Their Local Broadcast Station Competitors.

With nearly syllogistic precision, Congress set forth *in the Cable Act itself* the anticompetitive potential and practices of cable television systems that the must carry provisions were designed to prevent. See generally Cable Act § 2(a). Congress specifically found that cable systems have used—and would continue to use—their essential, bottleneck monopolies in an anticompetitive fashion to injure their local broadcast competitors. In reaching this conclusion, Congress determined, first, that cable television systems are bottleneck monopolies that control subscribers' access to video programming. Cable systems

"face[] no local competition" because they have the hallmark characteristic of essential facilities: "the extraordinary expense of constructing more than one cable television system to serve a particular geographical area." *Id.* at § 2(a)(2).

Second, over-the-air broadcast is dependent upon carriage by cable systems, rather than a substitute for cable programming. "[O]ver 60 percent of the households with television[] subscribe to cable television," *id.* at § 2(a)(3), and "[m]ost subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services." *Id.* at § 2(a)(17). Congress found that alternative means of mandating direct access to broadcast services—for example, requiring cable systems to install so-called "A B switches" that would permit a television viewer to switch between cable and broadcast reception—are "not an enduring or feasible method of distribution." *Id.* at § 2(a)(18).

Third, "[t]he cable industry has become vertically integrated" between programming production and transmission of programming. *Id.* at § 2(a)(5). "As a result, cable operators have the incentive and ability to favor their affiliated programmers." *Id.*[10]

Fourth, "[c]able television systems and broadcast television stations increasingly compete for television advertising revenues." *Id.* at § 2(a)(14); see also *id.* at § 2(a)(19). The cable operator has a financial interest not only in the advertising presented with its own programming, but also in advertising that runs with cable programming services that it carries but does not own. Thus,

[10] The anti-competitive effects of these combinations are exacerbated by the fact that the cable industry has a local monopoly at the end of the vertical chain.

for example, local operators are given advertising space on national cable networks, such as ESPN. This is sold to local advertisers.[11] Cable operators also sell advertising on locally originated cable channels. Both types of advertising compete directly with advertising that local broadcast stations sell. In sum, competition for advertising revenue is primarily at the local level, where cable operators exert monopoly control to undermine competition from local broadcast stations.

Fifth, cable television systems have every economic incentive to use their bottleneck monopoly facilities to impede or bar access of competing broadcast television stations to subscribers, thus benefiting the cable system financially at the expense of its direct competitors:

> A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator. As a result, there is an economic incentive for cable systems to terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to disadvantageous channel position. There is a substantial likelihood that absent the reimposition of such a [must carry] requirement, additional local broadcast signals will be deleted, repositioned or not carried.

Id. at § 2(a)(15).

Finally, without a must carry requirement, the cable systems' anticompetitive practices of "delet[ing], reposition[ing], or not carry[ing] local broadcast signals" would

[11] National cable networks also sell advertising at the national level in direct competition with independent television stations, which sell advertising to both local and national advertisers. Thus, a vertically-integrated local cable operator has a dual incentive to damage competitive broadcast stations which compete for advertising at both the national and local levels.

"seriously jeopardize[]" the "economic viability of free local broadcast television." *Id.* at § 2(a)(16). This result, in turn, reduces the locally based broadcast services available *both* to cable subscribers and to television viewers who do not subscribe to cable television—by virtue of choice, availability, or financial resources. See *id.* at § 2(a)(10)-(11); see also *id.* at § 2(a)(12) ("[t]here is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming").

Even if these congressional findings embodied in the Act were not sufficient to prove the procompetitive purpose of the must carry provisions, an extensive legislative record amply supports each step of this syllogism. The 1991 Cable Act was the product of three years of lengthy hearings from 1989-91.[12] Those hearings and the resulting congressional reports reflect documented information from an enormous number of industry and consumer representatives.[13]

[12] *See Cable Television Regulation: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. (1991); *S. 12—Cable Television Consumer Protection Act of 1989: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp.*, 102d Cong., 1st Sess. (1991); *S. 1880—Cable Television Consumer Protection Act of 1989: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp.*, 101st Cong., 2d Sess. (1990); *Oversight of Cable TV: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp.*, 101st Cong., 1st Sess. (1989); *Must Carry: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp.*, 101st Cong., 1st Sess. (1989); *Media Ownership: Diversity and Concentration: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp.*, 101st Cong., 1st Sess. (1989).

[13] *See* H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. (1992); H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992); S. Rep. No. 92, 102d Cong., 1st Sess. (1991).

Thus, Congress had before it extensive evidence of the cable systems' essential monopoly position. See generally S. Rep. No. 92, 102d Cong., 1st Sess. 8-13, 24-29 (1991) (collecting sources). In particular, Congress was aware of the enormous expense of constructing cable systems and the fact that more than 99 percent of the Nation's more than 11,000 cable television systems confront *no* competition. See *id.* at 13 & n.35 (citing sources). The dependence of broadcast television upon cable television also was well documented. The Senate Report specifically noted that "98 percent of cable homes do not have roof top antennas connected to their television sets," and credited the FCC's conclusion that "the cable industry encouraged its subscribers to take down their antennas and eliminate their capacity to receive signal[s] off-air." *Id.* at 45. The bases for rejecting proffered alternatives to the must carry requirement were extensively set forth. *Id.* at 44-46.[14]

Congress also relied upon extensive evidence of the cable systems' actual practices of refusing to carry or of repositioning local broadcast television stations.[15] The House and Senate Reports credited a far-reaching FCC study of cable system practices, which showed that cable systems routinely refused to carry local broadcast stations and often provided them with inferior channel placement. *Id.* at 42-44 (setting forth conclusions of "Cable System Broadcast Signal Carriage Survey," Staff Report by the Policy and Rules Division, Mass Media Bureau, Federal Communications Commission (Sept. 1, 1988)); H.R. Rep. No. 628, *supra*, at 52-53. "By far the most frequent replacement for a dropped local television station is a basic cable network—the program services in which cable operators often own equity interests and or profit from local advertising sales." S. Rep. No. 92, *supra*, at 43. These denials of carriage and shifting of channels reflected the cable systems' ownership interest rather than viewer preferences, because the favored programming was often less popular than the displaced broadcast programming.[16]

The burden of the cable systems' anticompetitive practices falls disproportionately upon smaller, independent television stations. Generally, a cable system has a financial incentive to carry the network-affiliated stations because that carriage maintains or increases the cable system's subscriber base. Indeed, these larger, network stations were the principal beneficiaries of the Cable Act's "retransmission consent" provisions, Cable Act § 6, which permitted stations to forgo their "must carry" rights and enter contractual negotiations for the carriage of their

[14] *See id.* at 45 ("[b]oth the cable and the broadcast industries have stated that the A/B switch is not a workable solution to the carriage problem"); *id.* at 45 n.115 (citing sources).

[15] *See, e.g., id.* at 42-43 & n.110 (citing testimony); H.R. Rep. No. 628, *supra*, at 53-56.

[16] *See* INTV, "Free Television Under Siege," May, 1988, *cited in*, S. Rep. No. 92, *supra*, at 43 n.110; S. Rep. No. 92, *supra*, at 40-44; *S. 12 Hearings*, *supra* (testimony of James B. Hedlund, Pres., INTV); INTV, "Stations Repositioned from VHF to UHF Channels by Cable Systems," *cited in*, *S. 12 Hearings*, *supra* (testimony of James B. Hedlund, App. H); Paul Kagen Assocs., Inc., *Marketing New Media* 2 (Jan. 1990), *cited in*, *S. 12 Hearings*, *supra*, at 228 n.48 (testimony of James B. Hedlund); Comments of the National Association of Broadcasters, *Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, MM Docket No. 90-4 (FCC filed Sept. 25, 1991); Federal Communications Commission, *Public Notice, Television Channel Utilization* (Sept. 4, 1992), *cited in*, Request of Def.-Intervenor Applicant INTV for the Ct. to Take Judicial Notice of Station Licenses & Channel Vacancies, *Turner Broadcasting Sys., Inc.* v. *United States*, Civil Action No. 92-2247 (D.D.C. filed Mar. 12, 1993); Federal Communications Commission, *Public Notice, Television Channel Utilization* (Sept. 7, 1989), *cited in*, Request of Def.-Intervenor Applicant INTV, *supra*; *see also* S. Rep. No. 92, *supra*, at 44 ("[i]n almost every instance, the stations shifted [to disadvantageous and unfamiliar channels] have been replaced by a cable program service in which the system operator is selling advertising or in which the operator has an equity interest or both").

signals. Smaller stations, most of which are INTV members, do not have that luxury.

Congress recognized that smaller, independent stations were peculiarly vulnerable to the cable systems' anticompetitive practices. See Cable Act § 2(a)(8)-(12). For those stations, denial of carriage or placement on an unfamiliar or disadvantageous channel could well put them out of business. See *supra* note 16. To viewers, particularly non-subscribers, that outcome would mean a loss of services (*i.e.*, fewer and/or weaker broadcast television stations). But to cable operators, it would mean the elimination of a competitor for finite advertising dollars. The cable operators' incentives to so eliminate competitors will only increase because the tapering growth in new cable subscribers and recently enacted cable rate regulation make advertising dollars the only source for increased cable revenues.[17]

Appellants argue that this evidence should be ignored because local broadcast stations have not gone out of business in large numbers prior to 1992 and because the overall number of instances in which Congress documented cable operators dropping and shifting local stations does not impress appellants as significant. But this analysis ignores the real import of the record before Congress. Even in a period of absolute market power where cable operators could charge virtually any amount to subscribers, cable systems engaged in widespread efforts to exclude and disadvantage local broadcast competitors. With the elimination of monopoly rents through rate regulation, Congress reasonably predicted that the cable systems would turn their full attention to advertising revenues, which meant that local broadcasters, unless

[17] *See* 47 U.S.C. § 543 (rate regulation); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report & Order*, 8 FCC Rcd. 5631 (1993).

protected, would be targeted for abuse in ever increasing numbers.[18] Given the important public interest served by these broadcasters, especially with respect to viewers who do not subscribe to cable, Congress was not required to wait for them to disappear before remedying the inherently anticompetitive structural defect in the market. If Congress' factfinding and policy judgments are entitled to any deference in this case, then this record is more than sufficient to sustain the must carry provisions.[19]

Congress has made clear that the must carry restrictions are essential to prevent monopoly abuse and thus to preserve the "fair, efficient, and equitable distribution of broadcast services" that had been developed pursuant to the Communications Act. Cable Act § 2(a)(9), including the preservation of local broadcast services engendered by the table of allotments. *Id.* § 2(a)(10)-(12). This Court has recognized that the government has both the authority to protect and a substantial interest in protecting local broadcasters from cable operators' monopoly abuse.

In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), this Court upheld the FCC's power to fashion regulations that included must carry provisions that were in certain respects more restrictive than those now at issue.[20] The Court held that regulation was proper be-

[18] *See S. 12 Hearings, supra*, at 232-33 (testimony of James B. Hedlund, Pres., INTV); *see also* Cable Act §§ 2(a)(14)-(16).

[19] *Cf. United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 176-77 (1968) (endorsing FCC regulation of cable systems based upon need to "plan in advance of foreseeable events, instead of waiting to react to them") (internal quotation omitted).

[20] Under the rules reviewed in *Southwestern Cable Co.*, "local [cable] systems were required to carry, upon request and in a specific order of priority, the signals of broadcast stations into whose viewing area they bring competing signals." *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 712 (1979) (Stevens, J., dissent-

cause, for example, importation of distant signals would likely "destroy or seriously degrade the service offered by a television broadcaster . . . and thus ultimately deprive the public of the various benefits of a system of local broadcasting stations." *Id.* at 175 (internal quotation omitted); compare Cable Act § 2(a)(10). Congress' various statements recognizing the importance of local broadcasting services, see, *e.g.*, Cable Act § 2(a)(10)-(11), simply reflect Congress' judgment that fair competition in this industry is particularly valuable to both cable subscribers and non-subscribers; it is not, as appellants assert, an indication of congressional intent to bolster the "content" of local broadcast programming. See, *e.g.*, Brief for Appellants Discovery Communications, Inc. at 26.

This Court also has recognized that local broadcasters are particularly vulnerable to cable systems' anticompetitive conduct. In *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 664 (1972), the Court held that "controlling the competitive impact [cable television] may have on broadcast services" readily justified regulation of cable television. In addition, regulation of "signal carriage by cable television systems reflect[s] an important and substantial federal interest" that includes "protecting noncable households from loss of regular television broadcasting service due to competition from cable systems." *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 714 (1984); compare Cable Act § 2(a)(12). In this case, the must carry provisions directly respond to the well-documented monopoly abuses that Congress expressly found are uniquely visited upon local broadcast stations.

ing). *Southwestern Cable Co.* passed upon the FCC's power, rather than upon the validity of the rules, but a plurality of the Court later indicated that the rules' "validity was . . . subsequently and correctly upheld by courts of appeals as within the guidelines of that decision. See, *e.g.*, *Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (CA8 1968)." *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 659 n.17 (1972).

B. General Antitrust Principles Both Proscribe The Abuses Of Market Power That Congress Enacted The Must Carry Provisions To Prevent And Justify Mandatory Access To Essential Facilities.

Any doubt that Congress enacted the must carry provisions to prevent anticompetitive abuses should be dispelled by the way in which those provisions parallel generally applicable antitrust principles. The must carry provisions address the same antitrust concerns that this Court and other courts have repeatedly acknowledged whenever monopolists use their essential facilities to harm their direct competitors. And the remedy that Congress imposed—mandated access to the monopolist's essential facility—is precisely that which antitrust laws traditionally require.

Section 2 of the Sherman Act is violated when a single entity "use[s] its monopoly power . . . in its service area to foreclose competition or gain a competitive advantage, or to destroy a competitor." *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 377 (1973); see also *United States* v. *Griffith*, 334 U.S. 100, 107 (1948).[21] A long-standing line of cases applied this principle to prohibit monopolists from employing "essential facilities" to disadvantage their actual or potential competitors. A facility is "essential" if access to it is necessary to allow competition in a related market and if competitors cannot practicably or feasibly duplicate it. See, *e.g.*, *MCI Communications Corp.* v. *AT&T*, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); see also *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973). A monopolist that controls such an essential facility violates the antitrust laws if it denies comparable use of the facility when access is in fact feasible. See *MCI Communications Corp.*, 708 F.2d at 1132-33.

[21] Section 2 of the Sherman Act prohibits efforts that "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States." 15 U.S.C. § 2.

United States v. *Terminal Railroad Association*, 224 U.S. 383 (1912), was one of the earliest cases applying these principles. There, a coalition of railroad companies controlled a bridge, tracks, and other facilities that allowed access to the St. Louis terminal, a junction vital to competing rail companies. This Court held that the coalition could not deny access to the terminal; instead, the antitrust laws required the combination of railroads to admit competing rail carriers. *Id.* at 409-411. Similar principles have been applied when the facility or resource controlled has been deemed vital to competition, even though alternative resources remain available. See, *e.g.*, *Associated Press* v. *United States*, 326 U.S. 1 (1945) (newspapers controlling important but not exclusive source of news required to allow access to news delivery by competitors).

More recent cases have applied similar principles to require access to a single entity's bottleneck facilities. In *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), this Court considered an electric utility's refusal to "wheel" power through its essential facilities to competing retail providers. The utility provided retail service and also possessed "a strategic dominance in the transmission of power in most of its service area," and its refusal to "wheel" impeded its competitors' ability to provide retail service. *Id.* at 377 (internal quotations omitted). Refusal of access thus constituted a violation of Section 2. *Id.* See also *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951) (denial of access by monopolist newspaper to advertisers violated antitrust laws when undertaken to harm competing broadcast station); *Aspen Highlands Skiing Corp.* v. *Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984) (monopolist required to provide access to multi-area ticket arrangement on basis of control of essential facility), *aff'd*, 472 U.S. 585 (1985) (same arrangement violated antitrust laws because non-dealing

was based on competitive harm to rivals rather than efficiencies).[22]

Congress' justifications for the must carry provisions precisely mirror the reasoning employed in these essential facilities cases. Congress, like the courts applying the Sherman Act, focused upon the anticompetitive effect inherent in control of facilities essential to competition, which cannot be readily or feasibly replicated. Compare Cable Act § 2(a)(2)-(3) (cost of developing cable television systems and resulting lack of competition); *supra* pp. 14-16, with *United States* v. *Terminal R.R. Ass'n*, 224 U.S. 383 (1912); *MCI Telecommunications Corp.*, 708 F.2d at 1132-34. As with the essential facilities line of cases, Congress scrutinized that monopoly control and recognized that impeding access to such facilities likely would provide—and indeed already had provided—the monopolist with an anticompetitive advantage over competing service providers. Compare Cable Act § 2(a)(5), (12)-(18) (dependence of broadcasters upon monopoly cable systems for programming delivery; vertical integration of cable systems creates incentive to harm local broadcast station competitors); *supra* pp. 15-17, with *Otter Tail Power Co.*, 410 U.S. at 377-78; *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S.

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[22] Similarly, the antitrust laws were held to have been violated by the Bell System's refusal to allow competing long distance providers access to the local telephone facilities essential to provide competitive telephone service. *See MCI Communications Corp.* v. *AT&T*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). *See also Delaware & Hudson Ry.* v. *Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2011 (1991); *Advanced Health-Care Servs., Inc.* v. *Radford Community Hosp.*, 910 F.2d 139 (4th Cir. 1990) (hospital and related services); *Fishman* v. *Wirtz*, 807 F.2d 520 (7th Cir. 1986) (sports arena); *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977) (football stadium), *cert. denied*, 436 U.S. 956 (1978); *Woods Exploration & Producing Co.* v. *ALCOA*, 438 F.2d 1286 (5th Cir. 1971) (natural gas pipelines), *cert. denied*, 404 U.S. 1047 (1972); *cf. United Air Lines, Inc.* v. *C.A.B.*, 766 F.2d 1107 (7th Cir. 1985) (computerized reservation system).

585 (1985); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951). Consistent with standard antitrust principles, the must carry provisions respond to this anticompetitive threat structurally by requiring that the monopolist provide competitors with reasonable access to the essential facility. Compare Cable Act § 4 with *Otter Tail Power Co.*, 410 U.S. at 377-78; *United States* v. *Terminal R.R. Ass'n*, 224 U.S. 383 (1912); *MCI Telecommunications Corp.*, 708 F.2d at 1132-34.

Appellants' only response to this congressional application of standard antitrust doctrine is to attempt a distinction between antitrust liability that arises in particular cases and Congress' authority to apply antitrust principles through a general rule directed at an industry. See, *e.g.*, Brief for Appellant Daniels Cablevision, Inc. at 18-19. No such distinction exists. First, the argument is conceptionally flawed. Cases produce rules, and rules must be applied in particular cases. See, *e.g.*, *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 432-33 (1990) (*per se* antitrust rules are product of judicial interpretation, "but the rules nevertheless have the same force and effect as any other statutory commands"). Cable systems are already subject to the "rules" regarding essential facilities set forth in the cases outlined above, *supra* pp. 23-25, and they face uncertain but potentially great antitrust exposure for anticompetitive actions, such as those identified in legislative hearings leading to the Cable Act. See *supra* notes 12, 16. In addition, the must carry provisions provide for case-by-case determinations that appellants demand: the "rule" of the must carry provisions is subject to waiver and exemption provisions, see 47 U.S.C. § 534(h)(1)(C); 47 C.F.R. § 76.59, and sanctions are imposed only following elaborate FCC proceedings, 47 U.S.C. § 534(d), which are subject to judicial review. See 47 U.S.C. § 402(a); 28 U.S.C. §§ 2342-44.

Second, Congress is fully empowered to craft rules that apply antitrust principles to particular industries. Congress has already performed this task for the railroad, motor carrier, telecommunications, natural gas, and other industries. Even administrative agencies are empowered to assess competitive conditions and apply general antitrust principles through rulemaking or adjudication, see, *e.g.*, *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974); *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), and Congress' power to craft legislative rules applying those principles is certainly no less. *Cf. FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943).

Finally, regulation through a legislative rule such as the Cable Act is *preferable* to vesting executive officers with broad prosecutorial discretion to proceed on an ad hoc basis against particular speakers. In the context of ensuring fair competition, broad *per se* rules are favored, even when governing ostensibly expressive activities. See *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 430-36. Although legislatures "ordinarily may delegate power under broad standards," the "area of permissible indefiniteness narrows" when a regulation promulgated pursuant to such power "potentially affects fundamental rights." *United States* v. *Robel*, 389 U.S. 258, 274-75 (1967) (Brennan, J., concurring).[23]

At bottom, Congress should not be hamstrung in its response to monopoly abuses in a way that allows threatened entities to be driven out of business before effective remedies can be applied. See *infra* note 24. Con-

[23] For this reason, this Court has struck down measures that allow executive officials to make ad hoc determinations as to whether speakers' activities were lawful. *See, e.g., Board of Airport Comm'rs* v. *Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987); *City of Houston* v. *Hill*, 482 U.S. 451, 466-67 (1987). This Court similarly has limited the discretion that may be exercised to target particular speakers through licensing and permit schemes or through administrative investigations. *See, e.g., FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 225-28 (1990) (and cases cited); *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

gress properly addressed the problem of the cable operators' abuse of their essential facilities by adopting the must carry provisions as structural rules to promote competition."[4]

C. The Cable Act's Application Of General Antitrust Principles To "Speakers" Triggers No Heightened First Amendment Review.

Measures designed to advance competition reflect a substantial governmental interest unrelated to the suppression of speech, and no heightened First Amendment standard of review applies merely because the affected monopolists engage in activities arguably protected as "speech." This basic precept defeats appellants' two principal claims: that as cable operators, they are entitled to a "level" of First Amendment protection, *i.e.*, "strict scrutiny", that they assert renders the must carry provisions invalid, and that the must carry provisions impermissibly discriminate among classes of speakers. In fact, all "speakers"—even newspapers—are subject to regulation designed to protect competition without triggering heightened review, and it is perfectly permissible to protect any class of entities, even a particular class of "speakers," from anticompetitive conduct. This is precisely what Congress did in the Cable Act.

This Court has repeatedly affirmed that no heightened scrutiny applies to the application of pro-competitive measures simply because they affect speakers or "speech." In *Associated Press* v. *United States*, 326 U.S. 1 (1945),

[4] Congress specifically rejected a "complaint based, case-by-case process—so-called 'negative must carry.'" H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 75 (1992). Congress concluded:

> Such post hoc approaches permit significant economic harm to occur before relief is granted. By then it is simply too late. Given the current economic condition of free, local over-the-air broadcasting, an affirmative must-carry requirement is the only effective mechanism to promote the overall public interest.

Id.

this Court not only upheld an antitrust decree that prohibited newspaper publishers from withholding or directing distribution of their "speech," but also indicated that applying antitrust principles to protect certain classes of speakers from anticompetitive conduct advances First Amendment values:

> [The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.

Id. at 20; see also *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139-40 (1969); *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155-56 (1951); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226-27 (1943); *cf. FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (no heightened First Amendment scrutiny of "expressive" concerted refusal to deal).

In *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978), this Court applied that principle in a context analogous to this case: general rules, embodying antitrust principles, that affected particular information industries. Invoking rational basis review, this Court upheld the FCC's cross-ownership regulation that limited newspaper owners' ability to "speak" through ownership of broadcasting stations. The Court set forth the principle that should resolve this case:

> [T]he regulations are in form quite similar to the prohibitions imposed by the antitrust laws. This

> court has held that application of the antitrust laws to newspapers is not only consistent with, but is actually supportive of the values underlying, the First Amendment.

Id. at 800 n.18. The only reason that this principle was "not a complete answer to the issues in this case" was that the FCC's rationale for the rule had "relied primarily on First Amendment rather than antitrust considerations." *Id.* Here, by contrast, there is no question of review of an agency's rationale, and Congress expressly and directly implemented "antitrust considerations." See *supra* pp. 14-28.[25]

Indeed, this Court routinely has upheld application of antitrust principles to types of restrictions on "speech" activities that are indistinguishable from those appellants assert. In *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951), this Court upheld an antitrust decree that required a newspaper to print advertisements that it previously had declined to publish from businesses that also advertised through a competing local broadcast station. This "must carry" obligation, limiting the newspaper's "editorial discretion," arose from the same circumstances found by Congress to necessitate the Cable Act provisions: the newspaper was a bottleneck monopoly that controlled essential distribution facilities, and it had denied access to advertisers for the purpose of harming its competitor (the local broadcast station). *Id.* at 148-49, 154-55.[26]

[25] One of two principal aspects of *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), also conforms to this analysis. This Court rested that decision upon the broadcaster's monopoly control over facilities essential to disseminating information. *Id.* at 386-91; *compare Lorain Journal Co.*, 342 U.S. at 147-48, 153-54. The decision is thus one of an extensive body of cases requiring bottleneck monopolists to provide access.

[26] *See also Associated Press* v. *United States*, 326 U.S. 1 (1945) (dissemination of news governed by consent decree); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948) (restrictions upon distribution of motion pictures); *compare supra* pp. 23-28.

The competitive harm to the local broadcast station arose from the same competition for limited advertising dollars that Congress identified as the basis for the Cable Act's must carry requirement. See *Lorain Journal Co.*, 342 U.S. at 148-49; compare Cable Act § 2(a)(14)(15).

The must carry provisions also may be understood as requiring monopolists to divest themseleves of control over certain information dissemination facilities to foster competition. This Court has repeatedly upheld application of such restrictions to First Amendment "speakers." See, *e.g.*, *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (restriction on newspapers' acquisition of broadcast facilities); *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139 (1969) (divestiture decree applied to monopoly newspapers); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226-27 (1943) (chain broadcasting restrictions).

These cases do not apply "heightened scrutiny" to regulations embodying general antitrust principles; instead, they invoke a more basic First Amendment principle regarding content neutrality. Measures designed to prevent anticompetitive conduct are "content neutral" because they are "*justified* without reference to the content of the regulated speech." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis in original) (internal quotation omitted); see also *Boos* v. *Barry*, 485 U.S. 312, 317 (1988) (opinion of O'Connor, J.); *Clark* v. *Community for Creative Non-Violence ("CCNV")*, 468 U.S. 288, 293 (1984); *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986); *cf. United States* v. *O'Brien*, 391 U.S. 367, 377 (1968) (measure not content based if government interest is "unrelated to the suppression of free expression").

The principle that heightened scrutiny does not apply when media entities are subject to procompetitive regulation also provides a complete response to appellants' claim that the must carry provisions unjustifiably discriminate among classes of speakers. See, *e.g.*, Brief for

Appellants Discovery Communications, Inc. at 23-25. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791.[27] Competitive regulation affecting monopoly abuse by information providers *necessarily* has a differential effect. This is so because it targets the source of monopoly abuse and seeks to benefit the entities subject to that abuse. Thus, in *Associated Press* v. *United States*, 326 U.S. 1 (1945), particular speakers—combining newspapers—were subject to restrictions that favored a separate class: the disadvantaged newspaper competitors. In *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951), the monopoly newspaper was restricted to benefit the broadcast station subject to monopoly abuse. Broader restrictions also apply only to particular classes of speakers. See, *e.g.*, *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (newspapers restricted); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943) (chain broadcasting rules).[28]

[27] In contrast, restrictions that do not reflect a neutral justification are subject to heightened scrutiny. *See, e.g., Riley* v. *National Fed'n of the Blind*, 487 U.S. 781, 789 n.5 (1988) (striking statute that compelled conveyance of state-specified message, after finding that "the desired and intended effect of the statute is to encourage some forms of solicitation and discourage others").

[28] In contrast, this Court has rejected distinctions among speakers that are not derived from the asserted neutral state interest. In *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), the Court deemed the city's distinction between commercial and non-commercial newsracks to be content-based because "the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted [in safety and aesthetics]." *Id.* at 1514. Instead, the ordinance was deemed content-based because it rested on the assumption "that commercial speech has 'low value.'" *Id.* at 1517. Here, the differential regulation of cable operators and local broadcasters is derived directly and solely from cable operators' ability and incentive to abuse their monopolies, and local broadcasters' vulnerability to that abuse.

In the Cable Act, Congress followed the same pattern. The must carry provisions do benefit local broadcast stations, but they do so precisely because that class of "speakers" competes with cable monopolies for local advertising revenues and thus is subject to monopoly abuse. See Cable Act § 2(a)(15)-(16). This "incidental effect on some speakers," *Ward*, 491 U.S. at 791, reflects Congress' careful tailoring of measures designed to advance competition, rather than impermissible discrimination that triggers heightened First Amendment scrutiny.[29]

Similar principles of "neutrality" are derived from the cases involving the application of general tax laws to some information providers but not to others.[30] The issue becomes, again, whether the incidental effect on certain burdened speakers is justified without reference to content (*i.e.*, is truly a revenue generating measure) or seeks to burden particular views or disfavored speakers. In considering a tax that applied fully to cable television oper-

[29] Judge Williams, in dissent below, also asserted that the must carry provisions discriminated among classes of speakers, by unduly favoring local broadcast stations. This conclusion ignores that the competitive market is *local*, and it ignores both the unique competitive vulnerability of those stations and incentives that cable operators have to harm those direct competitors in the provision of programming to the home (and thus competitors for advertising revenue). *See also infra* pp. 37-38. Judge Williams's dissent in this regard particularly rested upon his conclusion that Congress had not made adequate findings concerning the existence of anticompetitive potential. *See* J.S. 63a-66a. That conclusion reflects inadequate respect for a coordinate Branch and ignores the substantial record support for Congress' conclusion that the district court majority found persuasive. *See supra* pp. 8-9.

[30] The analogy is not exact because taxation schemes may readily be made more general and thus operate without discriminating among speakers. In contrast, procompetitive measures directed at monopolies controlled by information producers necessarily must discriminate among speakers. Thus, a more stringent standard of review might apply to review of discriminatory tax schemes, but, as discussed in text, the Cable Act's must carry provisions readily pass even that test.

ators but not to certain newspaper and magazine sales, this Court held that "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas." *Leathers* v. *Medlock*, 111 S. Ct. 1438, 1447 (1991). Appellants do not and cannot point to any danger that the must carry provisions could suppress particular ideas, or even suggest what those ideas may be. It is clear that the "status" of the cable operators as First Amendment "speakers" does not require the application of any heightened scrutiny.

II. THE MUST CARRY PROVISIONS DIRECTLY AND NARROWLY ADVANCE THE GOVERNMENT INTEREST IN PREVENTING THE CABLE MONOPOLISTS' ANTICOMPETITIVE CONDUCT.

Application to media entities or information providers of measures designed to protect competition, such as the must carry provisions, triggers no heightened scrutiny or tailoring requirement. See *supra* pp. 28-34; see also *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951); *Associated Press* v. *United States*, 326 U.S. 1 (1945). To the extent any heightened scrutiny were found applicable, it should be applied, as it usually is, only to ensure that the government in fact is pursuing the articulated, content-neutral state interest rather than an impermissible interest directed to suppressing particular messages. See, *e.g.*, *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989); *United States* v. *O'Brien*, 391 U.S. 367 (1968). If any doubt remains that the Cable Act's must carry provisions are designed to and in fact do protect against anticompetitive abuses, it is resolved by the close fit between Congress' expressly stated purpose of protecting against monopoly abuse and Congress' chosen means reflected in Section 4 of the Cable Act.

A governmental measure satisfies this heightened scrutiny if it is not "substantially broader than necessary" and if "the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (quoting *United States* v. *Albertini*, 472 U.S. 675, 689 (1985)); see *Albertini*, 472 U.S. at 689 (same standard defines tailoring requirement of *United States* v. *O'Brien*, 391 U.S. at 377); *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696, 2705 (1993) (reaffirming *Ward* standard).[31] Similar "fit" requirements apply to review of time, place, and manner restrictions, see *Clark* v. *CCNV*, 468 U.S. 288, 298 (1984) (*O'Brien* standard equivalent to time, place, and manner standard), and to review of commercial regulations. See *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. at 2705.

Section 4 of the Cable Act promotes Congress' interest in preventing anticompetitive abuses in a direct manner that is not "substantially broader than necessary." *Ward*, 491 U.S. at 800. Congress identified cable systems' incentive and ability to abuse monopoly power regarding a discrete class of competitors: local broadcast stations that compete for local advertising revenues. Cable Act § 2(a)(14). Section 4 benefits *only* that class of programmers. See 47 U.S.C. § 534(h)(1)(A) ("local commercial television station" is one "within the same television market

[31] *O'Brien* and related cases also require that the challenged regulation (1) be "within the constitutional power of the Government;" (2) "further[] an important or substantial governmental interest;" and (3) further an "interest [that] is unrelated to the suppression of free expression." *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). The Commerce Clause empowers Congress to enact the must carry provisions. Congress has a substantial interest in preventing anticompetitive conduct, and particularly possesses an "important federal interest" in preventing cable systems from using their market power to harm providers of local broadcast services. *See Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 714 (1981); *supra* pp. 20-22. Preventing monopoly abuses is unrelated to the suppression of free expression. *See supra* Part I.

as the cable system"); *id.* at § 534(h)(2)(local low power station). Indeed, stations receive protection only in their local market. *Id.* at § 534(a), (h)(1)(B)(i)-(ii). Most importantly, the Act expressly provides that the "broadcasting station's market" shall be subject to a waiver process by which a cable operator can escape the must carry obligation upon a showing that doing so would "better effectuate the purposes of this section." *Id.* at § 534(h)(1)(C).

Congress' chosen remedy also responds directly to the identified anticompetitive activity. Congress determined that cable systems' monopoly power provided cable operators with the ability to harm competing local broadcast stations by denying access or repositioning stations to unfamiliar and disadvantageous channels. See Cable Act § 2(a)(15). Section 4 of the Act, in turn, imposes the requirements that cable operators not deny carriage to certain local broadcast station competitors, see 47 U.S.C. § 534(a), and not degrade their carried signals or reposition their channels. See *id.* at § 534(b)(4), (6). Requiring that a monopolist in control of essential facilities provide reasonable access, or divest itself of control over a portion of those facilities, are traditional antitrust remedies, even as applied against information providers.[32] Congress specifically considered and rejected proffered alternatives that were "not an enduring or feasible method of distribution and . . . not in the public interest." Cable Act § 2(a)(18), see also *supra* notes 14, 24.

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[32] *See, e.g., MCI Communications Corp.* v. *AT&T*, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951); *Associated Press* v. *United States*, 326 U.S. 1 (1945); *see also FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (limitation of control); *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969) (divestiture of control).

There is no doubt that the must carry provisions "leave open ample alternative channels for communication of the information." *Clark* v. *CCNV*, 468 U.S. at 293. Cable systems with small capacity or small numbers of subscribers are exempt; for larger cable systems, the Act guarantees that must carry stations will consume no more than a third of the activated channels on the system, and that program duplication will not occur. See 47 U.S.C. § 534(b).

Judge Williams, in dissent below, argued that requiring cable opertators to lease access, as provided by 47 U.S.C. § 532, was a less restrictive means of accomplishing Congress' objectives. J.S. 59a. This point, which had not been briefed in the district court, entirely mistakes (1) the nature of competition between broadcasters and cable systems; (2) cable systems' power to act anticompetitively; and (3) the operation of leased access. Leased access would be *less* efficacious because cable operators would remain free to discriminate among programmers, and thus able to employ their monopoly power to the disadvantage of particular local broadcast competitors.[33] Leased access would not be less burdensome; indeed, *appellants* assert that it would require precisely the forced carriage and divestiture of control that they find objectionable in the must carry provisions. See *e.g.*, Brief for Appellants Discovery Communications, Inc. at 47 n.21.[34] In addition, leased access, unlike the must carry provisions, does not precisely respond to the need to protect the particular local broadcasting competitors that

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[33] The FCC has concluded that the leased access provisions have proved largely ineffective. *See Competition, Rate Deregulation & the Comm'n's Policies Relating to the Provision of Cable Television Serv., Report*, 5 FCC Rcd. 4962, 4973-76 (1990).

[34] Even if leased access were less burdensome, under an *O'Brien* "intermediate scrutiny" analysis, a challenged measure is not "invalid simply because there is some imaginable alternative that might be less burdensome on speech." *United States* v. *Albertini*, 472 U.S. 675, 689 (1985).

the cable operator has the greater incentive and ability to harm.[35]

Appellants, in contrast, advance two principal objections to the "fit" between the must carry provisions and Congress' procompetitive aims. First, they claim that the must carry provisions "indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator." Brief for Appellants Discovery Communications, Inc. at 45 (internal quotation omitted). This reasoning is doubly flawed. Congress crafted the must carry provisions not to ensure a particular "quantity" of local broadcasting but to respond to the cable systems' incentive and ability to use their monopoly power against all local broadcast competitors. In addition, appellants' invitation to examine particular markets and the need to protect particular broadcast stations ignores this Court's holding that "the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Ward*, 491 U.S. at 801; see *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. at 2705-06.

Second, appellants claim that, in some cases, a local broadcaster "is entitled to carriage even if it carries no local programming at all." Brief for Appellants Discovery Communications, Inc. at 45-46 (internal quotation omitted). This point *supports* the validity of the must carry provisions because it confirms both the Act's content neutrality and its careful "fit." Congress sought to protect local stations against economic harm based upon

[35] Leased access approaches would also undermine Congress' desire to prevent monopoly abuse. It would permit cable operators to use their market power to extract unreasonable payment for carriage. Such a result stands in stark contrast to congressional policies to promote competition.

their *competitive* position. That vulnerability to the cable systems' monopolistic abuse exists by virtue of competition for advertising dollars—*without respect to the content* of broadcast programming. Congress precisely crafted the must carry provisions to meet the anticompetitive danger that it had identified.

III. APPELLANTS' POSITION WOULD UNJUSTIFIABLY UNDERMINE AN ARRAY OF GENERAL REGULATORY MEASURES DESIGNED TO PREVENT ANTICOMPETITIVE CONDUCT WITHIN INFORMATION PRODUCTION AND TRANSMISSION INDUSTRIES.

As the preceding sections show, this case presents this Court with two quite different paradigms for addressing regulation of information providers. The first is the traditional First Amendment approach of upholding regulatory measures that are designed directly to prevent anticompetitive conduct, even when information providers possess the monopoly power subjected to regulation. See *supra* pp. 23-34. The second, suggested by appellants, would require this Court to determine whether a particular regulated entity is a "speaker" for First Amendment purposes and, if so, to subject to strict scrutiny even those governmental measures that advance traditional procompetitive objectives.[36]

The choice in this case between these two approaches is particularly important because technological developments are blurring the distinction between information transmission and information production: in the new "information age," many transmission monopolists will also be able to claim to be "speakers" through ownership of interests in text and programming services and through

[36] *See, e.g.*, Brief for Appellant Daniels Cablevision, Inc. at 5-23; Brief for Appellant Turner Broadcasting Sys., Inc. at 27-31; Brief for Appellant Time Warner Entertainment Co., L.P. at 21-31; Brief Amicus Curiae of the California Cable Television Ass'n in Supp. of Appellants at 3-19.

control over the mix of information customers may receive. Under the traditional First Amendment approach set forth in the preceding sections, the government could regulate their monopoly power and prevent competitive abuses, even with incidental effects on the mix of carried messages, but could not enact measures designed to and having the purpose of balancing or altering the content of those messages. Under appellants' theory of the case, the convergence of technologies would enable a vast range of monopolists to escape regulations designed to constrain their anticompetitive actions.

Until relatively recently, few First Amendment questions of this nature arose because a fairly sharp division existed between, on the one hand, control of transmission of information through essential, bottleneck monopolies and, on the other, the production of information, which might be distributed in any number of ways. Thus, the telephone industry largely confined itself to carriage of other persons' messages and provided few services or products that were entitled to First Amendment protection. Local telephone service was and is provided through a classic bottleneck monopoly.[37] Information providers, however, distributed their products in a variety of ways: for example, over telephone facilities, through public mails or private newspaper delivery, or through theaters and bookstores.

Generally, information distribution did not involve essential facilities, and the exceptions could be addressed by particular antitrust suits. See, *e.g.*, *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *Asso-*

[37] *See United States* v. *Western Elec. Co.*, 900 F.2d 283 (D.C. Cir.), *cert. denied*, 498 U.S. 911 (1990); *MCI Telecommunications Corp.* v. *AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *United States* v. *Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, *Maryland* v. *United States*, 460 U.S. 1001 (1983).

ciated Press v. *United States*, 326 U.S. 1 (1945). The exception to this neat division was television and radio broadcasting, which combined transmission with information production—and for which this Court developed a sui generis First Amendment jurisprudence to match Congress' sui generis regulatory scheme. See, *e.g.*, *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); 47 U.S.C. §§ 301-333.

Increasingly, however, this traditional division is rapidly disintegrating.[38] The same entities that control wire-based facilities that are bottleneck monopolies also use those facilities to deliver their own programming and selection of programming and information services. As this case shows, cable system operators combine both functions, through both their ownership of programming they transmit and through their ability to shape the mix of programming available to viewers. Satellite and other wireless broadcast services present similar issues. Local telephone companies increasingly provide various video and text services entitled to First Amendment protection. Entities that manufacture and control equipment that allows customers to receive information services also increasingly seek to develop programming and other protected "speech" products. In addition, information providers traditionally entitled to First Amendment protections—for example, publishers, newspapers, and libraries—increasingly rely upon potentially monopolistic electronic transmission to distribute their products, through electronic publishing, interactive text services, or otherwise. As the recent spate of mergers and joint ventures between information providers and transmitters shows, this trend will only accelerate.

[38] *See generally* Walter G. Bolter, *Telecommunications Policy for the 1990s and Beyond* (1990); Gerald R. Faulhaber, *Telecommunications In Turmoil: Technology and Public Policy* (1987); Ithiel de Sola Pool, *Technologies of Freedom* (1983).

The defining characteristic of regulation of information transmission facilities has been the government's application of general rules to particular industry segments in order to prevent anticompetitive conduct. The must carry provisions are merely one of a vast array of such regulations, affecting nearly every segment of the telecomunications industry. Because many of these transmission facilities are enormously expensive and allow declining marginal transmission costs, they continue to present broad opportunities for market power abuses.[39]

Of particular importance is the array of regulations that affect carriage of information products that are, or may be, entitled to First Amendment protection. For example, the FCC has for more than a decade struggled to craft rules to guide the provision by telephone companies of "enhanced services," which include many value-added, "multimedia," and other information products.[40] Similarly, complex rules govern when telephone companies may provide video services,[41] and Congress is considering legislation addressing related issues.[42] Telephone com-

[39] *See, e.g., United States* v. *Western Elec. Co.*, 900 F.2d 283 (D.C. Cir.) (anticompetitive potential of local telephone companies' bottleneck monopoly), *cert. denied*, 498 U.S. 911 (1990).

[40] *See, e.g., Second Computer Inquiry, Final Decision*, 77 F.C.C.2d 384, *modified*, 80 F.C.C.2d 50 (1980), *further modified* 88 F.C.C.2d 512 (1981), *aff'd, Computer & Communications Industry Ass'n* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *Computer III Remand Proceeding, Notice of Proposed Rulemaking*, 5 FCC Rcd. 5242, *further proceedings*, 6 FCC Rcd. 174 (1990) (Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards), *further proceedings*, 6 FCC Rcd. 7571 (1991), *pet. for review pending, California* v. *FCC*, No. 92-70083 (9th Cir. filed Feb. 14, 1993).

[41] *See, e.g., Telephone Company-Cable Television Cross-Ownership Rules, Second Report & Order*, 7 FCC Rcd. 5781, 5820-21 (1992).

[42] *See National Communications Competition and Information Infrastructure Act of 1993*, H.R. 3636, 103d Cong., 1st Sess. (1993); *see also, Antitrust Reform Act of 1993*, H.R. 3626, 103d Cong., 1st Sess. (1993).

panies' provision of "information services" is still affected indirectly by an antitrust consent decree as well as by FCC regulations, and legislation is pending in Congress to address these issues as well.[43]

A particularly effective and pervasive governmental response to control over bottleneck facilities has been to require that monopolists provide various forms of reasonable access to entities that might be subject to anticompetitive harm. For example, certain local telephone companies must provide non-discriminatory, equal access pursuant to an antitrust consent decree,[44] but FCC regulations impose like requirements on local telephone companies generally.[45] Congress, too, is considering imposing similar access duties.[46] Along with telephone companies, satellite carriers are subject to a statutory "common carrier" duty, which prohibits unreasonable discrimination among customers and requires provision of service when feasible. See, *e.g.*, 47 U.S.C. §§ 201(a)-(b), 202(a). Cable operators are subject to certain "leased access" requirements, and the 1992 Cable Act imposes various nondiscrimination requirements that are not at issue in this case. See 47 U.S.C. §§ 532, 536, 548.

Appellants' interpretation of the First Amendment poses substantial risk to the viability of this entire range

[43] *See, e.g., Modification of Final Judgment*, Decree § II(D) (interexchange restriction), *cited in, United States* v. *Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd Maryland* v. *United States*, 460 U.S. 1001 (1983); *Telecommunications Infrastructure Act of 1993*, S. 1086, 103d Cong., 1st Sess. (1993); H.R. 3626, *supra*.

[44] *See Modification of Final Judgment, supra*, at Decree §§ II(B), IV(F), App. B.

[45] *MTS & WATS Market Structure, Third Report & Order*, 93 F.C.C.2d 241, *recon.*, 97 F.C.C.2d 682 (1983), *further recon.*, 97 F.C.C.2d 834, *aff'd in part, remanded in part, NARUC* v. *FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[46] *See* H.R. 3636, *supra*.

of government efforts to prevent anticompetitive abuses in these monopoly-ridden industries. First, appellants concede that protecting competition is a legitimate if not compelling interest, even in these industries, but assert that the government is limited to pursuing this interest through individualized, ad hoc enforcement efforts, such as antitrust suits. See *supra* pp. 26-27. They would bar the FCC or Congress from enacting regulations or statutes that effectively target particular competitive problems within these industries.[47] And, as noted above, generally applicable regulations are the preferable means for protecting fundamental rights. See *supra* pp. 27-28. But, in many ways, the distinction appellants attempt to draw also is illusory. For example, much of the telephone industry is regulated through administration of a consent decree, but Congress is now considering legislation that would supersede aspects of the decree.[48] The actual impact on information providers of the "regulation" of their activities is not affected by whether the "rules" govern-

[47] The local telephone companies acknowledge that "common carrier" requirements that force them to carry the messages of their competitors are consistent with the First Amendment. *See* Brief of United States Tel. Ass'n at 23. This is so even though "common carrier" obligations are precisely the industry-specific measures designed to prevent anticompetitive conduct that the local telephone companies elsewhere attack, *id.* at 22, and even though the common carrier obligations are "far more extensive than a must-carry rule." *Id.* at 23. In fact, appellants' arguments, by denying the government the ability to regulate through general rule to preclude an information industry's monopolistic abuses, would also call into question these "common carrier" obligations that are essential to regulation of the telecommunications industry. And, contrary to the telephone companies' suggestion, there is no basis to believe that video providers—either the telephone companies themselves or cable operators—will relinquish their bottleneck control over information by providing general access to competitors.

[48] *See Antitrust Reform Act of 1993*, H.R. 3626, 103d Cong., 1st Sess. (1993).

ing competition are set forth in a judicial decree, regulation, or statute.[49]

Second, appellants' novel theory threatens the government's ability to regulate these emerging and established information industries because, in appellants' view, the monopolist's *status* as an information provider makes it a First Amendment "speaker" entitled to the highest degree of protection—and to heightened "scrutiny" of any regulation—without regard to whether the regulation targets anticompetitive conduct rather than information content. Under appellants' theory, even a regulation focused upon anticompetitive harm will still be subject to strict scrutiny whenever that regulation—like the must carry provisions or any other effective "access" based requirement—"discriminates" between the monopolist "speaker" and the speakers shielded from anticompetitive abuse. Thus, Congress and the FCC would effectively be barred from establishing legislation or regulation to govern these industries.

In contrast, adhering to traditional First Amendment doctrine would not unsettle this vast range of procompetitive regulation and would continue to protect core First Amendment values. Thus, Congress or the FCC could enact measures that directly address the structural anticompetitive ability and incentives that are pervasive and increasing in many of these information transmission industries. At the same time, ordinary judicial review under the First Amendment would ensure that such regu-

[49] Given the size of the affected industries, appellants' requirement of "individualized" regulation through enforcement actions would result in no regulation at all. The FCC recently announced that it would seek to hire scores of new employees to review and analyze cable operators' filings in response to the rate regulation imposed by the Cable Act. That personnel requirement would increase exponentially if the FCC, or the Justice Department, were required to investigate, monitor and seek judicial redress for complaints of anticompetitive action against individual local broadcasters.

lation is confined to content neutral purposes, and never serves to burden particular messages or to target particular speakers based upon their views.

The must carry provisions at issue in this case present precisely this choice. Congress, relying upon an extraordinary record and findings, has regulated through a general rule directly to achieve classic antitrust objectives of preventing anticompetitive abuses of monopoly power. That conclusion traditionally ends the First Amendment inquiry. Nonetheless, the subjects of that regulation object that strict scrutiny is required because they engage in protected editorial and programming activities. To accept that claim would challenge the full range of Congressional and FCC regulatory actions that are directed to the emerging information carriage and production industries. Such regulatory upheaval is not required by the First Amendment, and therefore, appellants' challenges should be rejected.

CONCLUSION

For the foregoing reasons, the judgment of the three-judge district court should be affirmed.

Respectfully submitted,

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